PEMBINAAN BATU JAYA SDN BHD v. PENGARAH TANAH DAN GALIAN, SELANGOR & ANOR

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: B-01(IM)-187-05-2013]
11 MARCH 2016

LAND LAW: *Alienation – Revocation of – Validity of decision – Length of time alienation granted to applicant – Whether considered – Whether applicant had interest over land – Whether State Authority ('SA') had prerogative power to revoke order of alienation previously granted – Whether decision to revoke bad in law – Whether SA's decision immune from judicial scrutiny – Whether SA acted in good faith – Whether reasons provided for revocation – Whether discretion to revoke exercised arbitrarily – Whether decision ought to be quashed*

On 3 February 1993, the appellant submitted an application to the Majlis Mesyuarat Kerajaan Negeri Selangor ('MMKN')/the State Authority of the Government of Selangor ('SA') for the alienation of the State land for mixed development and the approval was granted on 26 July 1995. *Vide* the appellant's application, the land use of the alienated land had been changed and was approved by the respondents. Since 2008, the appellant made attempts to effect the registration of the land by submitting the relevant survey and pre-computation plans to the relevant parties so that the registration of the land could be completed in favour of the appellant. The said registration, however, did not take place and the land remained as State land. In 2012, the appellant was informed that the alienation of the land in favour of the appellant had been revoked by MMKN. Aggrieved with the decision, the appellant filed an application for judicial review in the High Court. Among others, the appellant asserted that since the respondents did not file an affidavit in reply to its affidavit which alleged the fact that the revocation was made due to non-payment of the premium on the land, then the respondents must, in law, be deemed as having admitted the factual circumstances. On the other hand, the respondents argued, *inter alia,* that the National Land Code ('NLC') conferred on the SA the prerogative power to revoke an order of alienation previously issued in favour of any person and therefore, the SA's decision was immune from any form of judicial scrutiny, including by way of judicial review. Further, it was submitted that since no registration had been completed, the land remained as State land and by virtue of s. 40 of the NLC, nobody could assert any right over it, although prior approval had been granted in relation to its alienation. The High Court was in favour of the submissions forwarded by the respondents and dismissed the appellant's application. Hence, this appeal. The issues that arose for consideration were (i) whether the SA had the power to revoke the order of

A alienation which was granted earlier; (ii) whether the decision to revoke the alienation was bad in law; (iii) whether the power to revoke was in the nature of a prerogative conferred on the SA whereby its exercise would be immune from scrutiny by the courts; and (iv) whether the respondents had a duty on their part to provide reason(s) for revoking the grant of alienation in favour
B of the appellant.

Held (allowing appeal)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The power to alienate which is expressly stipulated in the NLC is
C regulated within the regime of the NLC. Once the SA decides to alienate a State land, the provisions of ss. 76 and 78 of the NLC are triggered and must be complied with. A stronger set of clear words would need to be employed in the NLC in order for the court to rule in favour of the respondents' submission that such power of revocation is indeed a
D prerogative power, with its attendant immunity from the court's scrutiny. However, no such words are found in the NLC to suggest such an intention on the part of the Legislature. The power to revoke an order of alienation by the SA is one in the nature of a discretion, as opposed to that of a prerogative or an absolute discretion. (paras 33, 37 & 39)

E **(2)** Although s. 40 of the NLC vests the SA with authority over State land, that power was not a prerogative power which exercise is beyond judicial reproach, in the sense that it is not justiciable. On the contrary, it is a statutory power which must be exercised according to legal principles and good conscience, as it is but an exercise of conferred statutory power by a public body. Indeed, the power to revoke any prior
F alienation order is not expressly provided for in the NLC, but rather, it is an implied power. While it is within the power of the SA in the sense that it is within its exclusive province to decide on matters pertaining to alienation of State land under the NLC, nevertheless, it is still bound under the law to exercise that discretion properly and not
G arbitrarily. (paras 43 & 44)

(3) One of the fundamental features in modern administrative law jurisprudence has been the growing need for the public decision maker to give reasons for his decision. The silence in a statute requiring that a reason or reasons be given by the decision maker ought not to be taken
H to mean that there is therefore no duty to give reasons. The silence in the statute, on the duty to give reason for a decision, ought not to be made a cloak or a blanket under which the decision maker could conveniently find refuge so that the rationale for his decision remains shrouded in mystery, privy only to himself, but not to the public at
I large, on whose behalf he is entrusted to discharge that duty. (paras 45 & 49)

(4) The alienation in this case was done more than 15 years ago. The appellant must, in all fairness, be said to have an interest in land. The land use of the alienated land had been changed on the application by the appellant and was approved by the respondents. The lack of reasons assigned by the SA pointed to the conclusion that it lacked good faith in revoking the grant of alienation of the subject land. The fact that a particular statute under scrutiny, *ie,* the NLC does not expressly provide a duty on the SA to give any reason when it decides to revoke an alienation order does not necessarily excuse the decision maker from assigning any reason for his decision. The circumstances in the particular case may invite an imposition of the duty to give reasons by necessary implication. The appellant may not be the registered owner of that land but to state that it had no interest in the land would be unjustified as well as unfair. (paras 55, 57, 61 & 63)

(5) The appellant was on the verge of completing the alienation process that could see it as the registered owner of the land, since the application and paper works had been in place and forwarded to the SA. After waiting in vain for a further two years, the appellant was informed that the order that had alienated the land in its favour was revoked and no reason was given for the revocation. These circumstances demand that reasons be given to the appellant as to why the alienation was revoked at a very late stage. Further, such decision was not immune from judicial review. Since no reason was given, when in fact and in law, it ought to be given by the SA when it revoked the alienation, that decision was therefore bad. In the circumstances, the decision was liable to be quashed. (paras 64, 65 & 69)

(6) The respondents had not even approved the pre-computation plan which was sent by the appellant two years ago and which had been approved by the respondents. Without that, Form 5A could not be issued and flowing from that, no premium could be calculated for the land in question. As such, the failure to file in the affidavit in reply must be taken to mean that what had been alleged in the appellant's affidavit was admitted by the respondents. Even the senior officer at the District Office of Petaling where the land was situated, was left to speculate and guess as to what was the reason for the revocation. The circumstances in this case appropriately demands that a reason be given for such revocation. (paras 67 & 68)

(7) The SA was ordered to refund whatever monies that had been expended by the appellant in relation to the land in question from the date of its alienation to the date of its revocation, with interest of 5% per annum, from the date of judgment till full payment. However, the appellant could not be given any damages since it had no title over the subject land. The appellant's application was ordered to be remitted back to the SA for it to consider the application and according to law, to make a lawful decision. (paras 72 & 73)

A ***Bahasa Malaysia*** *Headnotes*

Pada 3 Februari 1993, perayu memohon kepada Majlis Mesyuarat Kerajaan Negeri Selangor ('MMKN')/Pihak Berkuasa Negeri Kerajaan Selangor ('SA') untuk memberi milik tanah Negeri bagi tujuan pembangunan dan kebenaran diberi pada 26 Julai 1995. Melalui permohonan perayu, kegunaan B tanah beri milik tersebut ditukar dan diluluskan oleh responden-responden. Semenjak 2008, perayu telah membuat beberapa cubaan untuk mendaftarkan tanah tersebut dengan mengemukakan pelan ukur dan pengiraan kepada pihak-pihak berkenaan supaya pendaftaran tanah tersebut boleh dibuat bagi pihak perayu. Walau bagaimanapun, pendaftaran tidak disempurnakan dan C tanah tersebut kekal sebagai tanah Negeri. Pada 2012, perayu dimaklumkan bahawa beri milik tanah tersebut kepada pihak perayu dibatalkan oleh MMKN. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan permohonan semakan kehakiman di Mahkamah Tinggi. Antara lain, perayu menghujahkan bahawa memandangkan responden-responden tidak D memfailkan afidavit balasan terhadap afidavitnya yang menyatakan bahawa pembatalan tersebut dibuat atas alasan kegagalan membuat bayaran premium tanah tersebut, responden-responden dengan itu telah, secara undang-undang, mengaku tentang perkara tersebut. Sebaliknya, responden-responden menghujahkan, antara lain, bahawa Kanun Tanah Negara ('KTN') memberi E kuasa prerogatif kepada SA untuk membatalkan keputusan beri milik tanah sebelum ini bagi sesuatu pihak dan oleh itu, keputusan SA dilindungi daripada sebarang bentuk penelitian kehakiman, termasuk semakan kehakiman. Dihujahkan selanjutnya bahawa memandangkan pendaftaran masih belum disempurnakan, maka, tanah tersebut kekal sebagai tanah Negeri dan menurut s. 40 KTN, sesiapapun tidak mempunyai hak F terhadapnya, walaupun kebenaran telah diberi sebelum ini untuk beri milik. Mahkamah Tinggi memutuskan berpihak pada hujahan responden-responden dan menolak permohonan perayu. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada SA mempunyai kuasa membatalkan keputusan beri milik yang telah dibenarkan sebelum ini; G (ii) sama ada keputusan membatalkan beri milik tanah tersebut tidak boleh diterima dari segi undang-undang; (iii) sama ada kuasa pembatalan yang diberi pada SA bersifat prerogatif di mana pelaksanaannya dilindungi daripada penelitian mahkamah; dan (iv) sama ada responden-responden mempunyai tanggungjawab mengemukakan alasan-alasan bagi pembatalan H kebenaran beri milik yang telah diberi kepada perayu.

Diputuskan (membenarkan rayuan)
Oleh Abang Iskandar HMR menyampaikan keputusan mahkamah:

(1) Kuasa untuk beri milik yang jelas dinyatakan dalam KTN dikawal selia I oleh KTN. Apabila SA memutuskan untuk memberi milik tanah Negeri, peruntukan ss. 76 dan 78 KTN akan dibangkitkan dan perlu dipatuhi. Perkataan-perkataan yang lebih tegas perlu dinyatakan dalam KTN supaya mahkamah boleh membuat keputusan berpihak kepada

hujahan responden bahawa kuasa pembatalan sebegitu adalah kuasa prerogatif, yang dilindungi daripada penelitian mahkamah. Walau bagaimanapun, perkataan sebegitu tidak dinyatakan dalam KTN untuk menunjukkan niat sebegitu oleh badan perundangan. Kuasa pembatalan keputusan SA untuk beri milik adalah bersifat budi bicara berbanding prerogatif atau budi bicara mutlak.

(2) Walaupun s. 40 KTN memberi kuasa kepada SA terhadap tanah Negeri, kuasa tersebut bukanlah prerogatif di mana pelaksanaannya melampaui penelitian kehakiman, hinggakan ia tidak boleh diadili. Sebaliknya, ia merupakan kuasa statutori yang perlu dilaksanakannya mengikut prinsip undang-undang dan niat baik, memandangkan ia adalah pelaksanaan kuasa berkanun oleh badan awam. Walaupun kuasa pembatalan sebarang keputusan beri milik tidak dinyatakan dalam KTN, ia merupakan kuasa tersirat. Memandangkan SA mempunyai kuasa di mana keputusan masih di tangannya untuk memutuskan perkara berkenaan beri milik tanah Negeri di bawah KTN, ia masih perlu melaksanakan budi bicaranya mengikut undang-undang dan bukan secara sewenang-wenangnya.

(3) Salah satu ciri penting undang-undang pentadbiran adalah agar pembuat keputusan memberi alasan bagi keputusan yang dibuatnya. Statut yang tidak menyatakan apa-apa tentang kehendak pembuat keputusan memberi alasan tidak bermakna bahawa tiadanya tanggungjawab untuk memberi alasan. Hanya kerana statut tidak menyatakan tanggungjawab memberi alasan, tidak boleh diertikan sebagai perlindungan di mana pembuat keputusan boleh dilindungi supaya alasannya tidak dikemukakan dan hanya diketahui oleh dirinya sendiri dan bukannya kepada orang awam, pihak yang beliau dipertanggungjawabkan untuk melaksanakan kewajipannya.

(4) Beri milik dalam kes ini berlaku lebih daripada 15 tahun dahulu. Demi keadilan, perayu mempunyai kepentingan dalam tanah tersebut. Kegunaan tanah yang diberi milik itu telah ditukar berdasarkan permohonan perayu dan diluluskan oleh pihak responden. Kegagalan SA memberi alasan menunjukkan bahawa ia tidak bertindak suci hati apabila beri milik tanah tersebut dibatalkan. Fakta bahawa sesuatu statut di bawah penelitian, iaitu, KTN, tidak menyatakan secara nyata bahawa SA mempunyai tanggungjawab untuk memberi alasan apabila memutuskan untuk membatalkan beri milik tidak mengecualikan pembuat keputusan daripada mengemukakan alasannya. Hal keadaan sesuatu kes boleh mendorong kehendak memberi alasan. Perayu tidak semestinya pemilik berdaftar tanah tersebut tetapi untuk menyatakan bahawa ia tidak mempunyai kepentingan adalah tidak munasabah dan tidak adil.

(5) Perayu berada di peringkat penyempurnaan proses beri milik yang akan membolehkannya menjadi pemilik berdaftar tanah tersebut, memandangkan permohonan dan kertas kerja telah pun dikemukakan kepada SA. Selepas menunggu selama dua tahun lagi, perayu dimaklumkan bahawa keputusan beri milik dibatalkan dan tiada alasan diberi untuk pembatalan tersebut. Keadaan ini menuntut agar alasan diberikan kepada perayu tentang kenapa pembatalan dibuat pada peringkat akhir. Selanjutnya, keputusan tersebut tidak dilindungi daripada semakan kehakiman. Memandangkan tiada alasan diberi oleh SA apabila beri milik tersebut dibatalkan, maka keputusan tersebut tidak boleh diterima. Dalam hal keadaan ini, keputusan tersebut boleh dibatalkan.

(6) Responden-responden juga tidak meluluskan pelan pengiraan yang dikemukakan oleh perayu dua tahun lalu. Tanpanya, Borang 5A tidak boleh dikeluarkan dan oleh itu, premium tidak boleh dikira untuk tanah tersebut. Kegagalan memfailkan afidavit balasan terhadap apa yang dinyatakan dalam afidavit perayu dianggap sebagai diakui oleh pihak responden. Malahan, pegawai kanan Pejabat Daerah Petaling terpaksa membuat mengenai alasan pembatalan tersebut. Keadaan dalam kes ini menuntut suatu alasan diberikan untuk pembatalan sebegitu.

(7) SA diarahkan untuk memulangkan semula apa-apa wang yang dikeluarkan oleh perayu berkenaan tanah tersebut dari tarikh beri milik sehingga pembatalan, dengan faedah 5% setahun, daripada tarikh penghakiman sehingga penyelesaian penuh. Walau bagaimanapun, perayu tidak diberi sebarang ganti rugi memandangkan ia tidak mempunyai hak milik atas tanah tersebut. Permohonan perayu diarah dikembalikan kepada SA untuk pertimbangan mengikut undang-undang, dengan membuat keputusan sah.

Case(s) referred to:

Breen v. Amalgamated Engineering Union [1971] 2 QB 175 ***(refd)***

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Dato' Dr Zambry Abd Kadir v. Dato' Seri IR Hj Mohammad Nizar Jamaluddin; Attorney General of Malaysia (Intervener) [2009] 5 CLJ 265 CA ***(dist)***

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***

Datuk Justine Jinggut v. Pendaftar Pertubuhan [2012] 1 CLJ 825 CA ***(refd)***

Doody v. Secretary Of State For The Home Department [1993] 3 All ER 92 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186 SC ***(refd)***

Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor [1990] 1 CLJ 44; [1990] 1 CLJ (Rep) 200 SC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Anor [2011] 2 CLJ 392 CA ***(refd)***
North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi [2011] 4 CLJ 729 FC ***(foll)***
Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(foll)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(dist)***
Pyx Granite Co Ltd v. Ministry Of Housing And Local Government [1958] 1 All ER 625 ***(refd)***
R v. Secretary Of State For Trade And Industry, Ex parte Lonhro Plc [1989] 1 WLR 525 ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Rohana Ariffin v. Universiti Sains Malaysia & Another Case [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 HC ***(refd)***

Legislation referred to:
National Land Code, ss. 40, 42, 76, 78(3)

Other source(s) referred to:
Tom Bingham, *The Rule of Law*, 2011, p 61

For the appellant - CK Yeoh (Jason Tay with him); M/s Tay Ibrahim & Partners
For the respondent - Ahmad Fuad Othman; FC State Legal Advisor's Office, Selangor

[Editor's note: For the High Court judgment, please see Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah Dan Galian Selangor & Anor [2013] 10 CLJ 570 (overruled).]

Reported by Kumitha Abd Majid

JUDGMENT

Abang Iskandar JCA:

[1] This has been an appeal by the appellant against the decision of the respondents in respect of the revocation by the latter of the order of alienation of a piece of State land that was previously made in favour of the appellant.

[2] This appeal is pertaining to a judicial review application ("the JR application") before the learned High Court Judge by the appellant against the impugned decision of the Majlis Mesyuarat Kerajaan Negeri Selangor ("MMKN") or the State Authority of the Government of Selangor ("SA") whereby the High Court had dismissed the appellant's JR application.

The Factual Background

[3] Apart from the complaint raised by the appellant, the factual matrix of this appeal has not been the subject of much significant dispute between the litigating parties. It would not be remiss on our part to list down the

A salient facts as outlined in the written submissions of the appellant as they had sufficiently captured the relevant milestones in the long journey that had been undertaken by the appellant, with regard to the land in question.

[4] On 3 February 1993, the appellant submitted an application to MMKN for the alienation of State land for mixed development. On 26 July
B 1995, MMKN approved the appellant's application for the alienation of State land known as Lot A, Kg Melayu Subang Tambahan ("Lot A, KMST") measuring approximately 70 acres for mixed development.

[5] Subsequent to the approval, the appellant made an application to
C MMKN to convert part of the land use from "Industrial" to "Shop Office and Commercial Complex". The application was allowed. This could be seen in evidence, as per the letter dated 5 August 1996 issued by Pejabat Daerah Tanah Petaling ("PDTP").

[6] By a letter dated 29 April 2005, MMKN reduced the size of the
D approved alienation from Lot A, KMST to a land measuring approximately 11.572 acres.

[7] It is pertinent to note from both the letters ie, letters dated 26 July 1995 and 29 April 2005 that Form 5A would only be issued after the pre-computation plan had been submitted and approved by the Selangor
E Town and Country Planning Department ("JPBD").

[8] Following from the letter dated 29 April 2005 issued by PDTP, the appellant had by a letter dated 17 January 2006, *inter alia*, appealed to the Land Administrator of PDTP to fix the premium for alienation at RM22 per square meter and to provide that the express condition of the land use be for
F "Commercial". PDTP did not entertain the appellant's appeal.

[9] However, a subsequent appeal by the appellant to PDTP for the express condition of the land use to be changed from "mixed development" to one of "Commercial" was successful.

G **[10]** It was again reiterated in PDTP's letter dated 15 November 2007 that Form 5A would only be issued after the pre-computation plan had been submitted to and approved by the PDTP.

[11] The following is the chronology of events that had transpired in relation to the appellant's submission of its pre-computation plan for
H approval by the PDTP:

22 May 2008	The appellant made another application to PDTP for the issuance of Form 5A. There was no response to this letter.
I 29 May 2008	The appellant submitted the relevant survey and pre-computation plans to PDTP ("the pre-computation plans") for the latter's further action to facilitate the issuance of Form 5A.

24 June 2008	PDTP replied to the appellant's letter dated 29 May 2008 and reiterated that the pre-computation plan had to be submitted before Form 5A could be issued.
29 July 2008	The appellant sent a letter to Jabatan Perancangan, Majlis Bandaraya Shah Alam ("MBSA"). It is evident from this letter that the pre-computation plans have been submitted to MBSA on 24 July 2008 and that the appellant was seeking the approval of Jabatan Perancangan MBSA with regards the pre-computation plans.
23 March 2010	Reminder was issued by the appellant to MBSA as there was no reply from MBSA in respect of the 29 July 2008 letter.
25 March 2010	The appellant wrote to the Menteri Besar of Selangor to, *inter alia*, request for the Menteri Besar to assist in the completion of the alienation of the land to the appellant.
5 April 2010	The Menteri Besar's Office wrote to the second respondent, enclosing the 25 March 2010 letter for the second respondent's further action.
7 April 2009	(Although dated 7 April 2009, it should be dated 7 April 2010) MBSA wrote to the second respondent and informed the second respondent, *inter alia*, that it did not have the necessary information regarding the land size that was alienated to the appellant and requested for the necessary information by 21 April 2010.
1 June 2010	The appellant wrote to the second respondent, to *inter alia*, request the second respondent to resolve the confirmation of the pre-computation plans so that Form 5A could be issued.
28 Nov 2011	The appellant wrote a letter similar to that of the letter dated 1 June 2010 to the second respondent's assistant (of the land division). There was also no reply to this letter.

[12] By a letter dated 27 June 2012, PDTP conveyed to the appellant that the alienation of the land to the appellant had been revoked by MMKN on 23 May 2012.

[13] By a letter dated 6 July 2012, the appellant appealed to the Menteri Besar's Office in writing, which was replied to by the latter *vide* letter dated 10 July 2012 in which it was reiterated that the decision of MKMN given on 23 May 2012 would stand and the appellant's appeal could not be considered in favour of the appellant.

[14] The appellant then had filed the JR application on 10 August 2012. The learned High Court Judge, having heard submissions by both parties, dismissed the said application on 19 May 2013. Being so aggrieved, the appellant had then appealed to the Court of Appeal, and hence the present appeal before us.

The High Court Decision

[15] We reproduce the pertinent portion of the grounds of judgment of the learned High Court Judge, that appears at pp. 27 to 33, of Supplementary Records of Appeal 1 below:

> Decision
>
> (Alienation of State Land - applicable law)
>
> The relevant provisions of the law relating to the alienation of state land can be found in ss. 40, 42, 76 and 78 NLC; they read as follows:
>
> Section 40. Property in State land, minerals and rock material
>
> There is and shall be vested solely in the State Authority the entire property in:
>
> (a) all State land within the territories of the State;
>
> (b) all minerals and rock mineral within or upon any land in the State the rights to which have not been specifically disposed of by the State Authority.
>
> Section 42. Powers of disposal
>
> (1) Subject to sub-section (2), the State Authority shall have power under this Act-
>
> (a) to alienate State land in accordance with the provisions of section 76;
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (2) ...
>
> Section 76. Meaning of alienation
>
> The alienation of State land under this Act shall consist of its disposal by the State Authority:

(a) for a term not exceeding ninety-nine years;

(aa) in perpetuity:

(i) where the Federal Government requires the State Authority to cause a grant in perpetuity to be made to the Federal Government or to a public authority or where the Federal Government and the Government of the state agree to make a grant in perpetuity to the Federal Government;

(ii) where the State Authority is satisfied that the land is to be used for a public purpose; or

(iii) where the State Authority is satisfied that there are special circumstances which render it appropriate to do so;

(b) in consideration of the payment of an annual rent;

(c) in consideration, unless the State Authority otherwise thinks fit to exempt therefrom in any particular case, of the payment of a premium;

(d) subject, unless the State Authority otherwise directs pursuant to sub-section (5) of section 52, to a category of land use determined in accordance with sub-sections (2) and (3) of that section; and

(e) subject to such conditions and restrictions in interest as may be imposed by the State Authority under, or are applicable thereto by virtue of, any provision of this Act:

Provided that nothing in paragraph (aa) shall enable the State Authority to dispose of any part of the foreshore or sea-bed for a period exceeding ninety-nine years; and paragraph (d) shall not apply to the alienation of land under this Act in pursuance of an approval given by the State Authority before the commencement thereof.

Section 78. How alienation is effected

(1) The alienation of State land under final title shall be effected in accordance with the provisions of Chapter 3.

(2) The alienation of State land under qualified title shall be effected in accordance with the provisions of Chapter 2 of Part Eleven.

(3) The alienation of State land shall take effect upon the registration of a register document of title thereto pursuant to the provisions referred to in sub-section (1) or (2), as the case may be; and, notwithstanding that its alienation has been approved by the State Authority, the land shall remain State land until that time.

In this application for judicial review, the decision impugned is the MMKN's decision on 23 May 2012 and confirmed on 30 May 2012 which was communicated to the applicant *vide* letter from the PTDP dated 27 June 2012, to revoke the alienation of the land.

A According to the NLC, the prerogative power over state land within the territories of the state, including the power of alienation is vested solely in the State Authority (s. 40). The power to alienate state land is subject to the conditions relating to the tenure of the land to be alienated; whether a term in perpetuity (freehold) or for a term not exceeding 99 years (leasehold). The other conditions relate to the amount of premium B payable, annual rent, category of land use, and such other conditions or restrictions as may be imposed (ss. 42 & 76).

It is provided that the alienation of state land is only complete upon the registration under a register document of title. Further, until such registration is effected, the land approved for alienation remains state land C (s. 78(3)).

In this instance, the land has been approved for alienation but the alienation of the land has not been completed. This is due to the fact that the registration pursuant to s. 78(3) has not been effected; no document of title to the land has been issued to the applicant. Therefore, D notwithstanding the fact that the land has been approved for alienation, the land remains state land. The State Authority's power to revoke the alienation has been recognised by our courts (see *North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor* [2011] 2 CLJ 392; *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729; *Government of the State of Negeri Sembilan v. Yap Chong Lan & Ors & Another Case* [1984] 2 CLJ 150; [1984] 1 CLJ (Rep) 144; *Dr Ti Teow* E *Siew & Ors v. Pendaftar Geran-Geran Tanah Negeri Selangor* [1981] CLJ 134A; [1981] CLJ (Rep) 142). In the circumstances, the revocation of the alienation of the land was an act which fell within the exercise of the State Authority's powers.

F Learned counsel for the applicant also referred to *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1, *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, and *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248; [1997] 2 MLJ 17. These cases are distinguishable G as they relate to planning law, power of the authority to impose conditions; and not to the power of a State Authority on alienation.

Similarly, the facts in *Glen Waverley Sdn Bhd v. Pengarah Tanah Dan Galian, Negeri Selangor & Anor* [2001] 8 CLJ 164 are also distinguishable. The court found that the land in question was no longer state land as the applicant had paid the relevant dues and the issue document of title was given to H the applicant to whom the land had been alienated. In that case, the State Authority was bound by a joint venture agreement entered into between the applicant and the Selangor State Government for the development of a piece of land in the state. Subsequently, the applicant surrendered the issue document of title to the first respondent (State Authority) for the purposes of re-alienation of the land to the applicant in accordance with I the approved layout plan and issued individual titles in respect of the sub-divided lots. The first respondent refused to deliver separate issue documents of title in respect of two sub-divided lots for a school and a

clinic and community hall respectively. The primary issues that arose were (i) whether, in denying title to the applicant, the first respondent had acted *ultra vires* and in breach of the doctrine of legitimate expectation; (ii) whether the school portion was unlawfully alienated to the second respondent; and (iii) whether *mandamus* was available to the applicant and ought to have been issue. The purported alienation of the portion of the land to the second respondent was an error of law and a nullity and void. The first respondent was under an obligation to issue individual titles to all the approved subdivided lots to the applicant. *Mandamus* was accordingly issued.

The applicant's case is also based on the doctrine of legitimate expectation. However, this argument is untenable as it has been pronounced by the Court of Appeal and affirmed by the Federal Court that the doctrine of legitimate expectation cannot and should not override the express statutory power vested in the State Authority (see Federal Court's decision in *North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor* at p. 747 para. [29]). Consistent with the prerogative nature of this power, there is no express right to be heard or to be informed of the grounds of revocation. (*Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186).

In further support of its case, the applicant also relied on the communication between one Anthony Michael and Dato' Zulkepli bin Ahmad, the District Officer of the District of Petaling. In the communication the said Anthony Michael was informed that the revocation was due to non-payment of the premium. The statement by Anthony Michael as to what Dato' Zulkepli said is hearsay and uncorroborated. Dato' Zulkepli was not called to give evidence to corroborate Anthony Michael's assertion. The fact that the respondents did not file any affidavit to dispute or challenge this assertion does not change or alter the character of the statement sought to be admitted. Hearsay evidence is evidence which ought to have been rejected; it does not become admissible simply because no objection was taken earlier. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties. (*Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp* [1986] 2 CLJ 285; [1986] CLJ (Rep) 185; Sarkar, *The Law of Evidence*, 13th edn, p. 51).

By reason of the foregoing, the court finds that there is no merit in fact or in law to justify the court in quashing the respondent's decision to cancel the alienation of the state land. In the premises, the application is dismissed with costs of RM10,000.

Issues Before Us

[16] Before us, there were two main issues that were raised by Mr Yeoh, learned counsel for the appellant. They were:

(a) The failure on the part of the respondents to respond to the averment of facts as contained in para. 44 of the affidavit-in-support by the appellant. As a result of such clear omission on the part of the respondents, which

was not disputed, the respondents must therefore be deemed under the law to have accepted the alleged facts as averred in the said affidavit. Two cases were cited before us to support this contention, namely; *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248; [1997] 2 MLJ 17 and the case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 AMR 622. Learned counsel for the respondents had submitted that the said averment was purely a matter of law and as such it needed no response from the respondents in the form of an affidavit-in-reply.

(b) That the impugned decision of the respondents was bad in law, in that, (i) it was made contrary to legitimate expectation of the appellant that the land in question would rightfully be transferred and be registered in the name of the appellant as it had been alienated to it way back in 1995. And, (ii) it was contended that the decision was bad as it was unreasonable in the *Wednesdbury*'s sense in that no reasons were proffered by the respondents as to why the alienation was revoked in the circumstances obtaining in this case. Procedural unfairness was also cited as a ground in urging this court to strike down the impugned decision of the respondents. The House of Lords' decision in the case of *CCSU* was cited in support for the propositions as advanced by learned counsel for the appellant.

The Respondents Position

[17] Before us, it was submitted by Encik Ahmad Fuad, learned counsel for the respondents, that the decision of the MMKN was immune from the court's scrutiny. He submitted before us that, for all intents and purposes, it was an exercise of a prerogative power and therefore, on account of that, it really was a non-justiciable matter that was beyond the court's jurisdiction. He had referred us to the case of *Dato' Dr Zambry Abd Kadir v. Dato' Seri IR Hj Mohammad Nizar Jamaluddin; Attorney General of Malaysia (Intervener)* [2009] 5 CLJ 265 CA ("*Dr Zambry* case").

[18] The main contention of the respondents was that the NLC conferred on the SA the power to revoke an order of alienation previously issued in favour of any person. It was further contended that that power of revocation was in the nature of a prerogative. Premised on those submissions, the decision of the SA in revoking the order of alienation in favour of the appellant was therefore immune from judicial scrutiny.

[19] We reproduce below the relevant provisions of the NLC which interplay had produced the position that was adopted by the respondents.

(a) Section 40 of the NLC had vested the prerogative power to the State Authority over the State land within its territory;

(b) Section 42 of the NLC further empowered the SA to alienate any State land in accordance with provision in s. 76 of the NLC;

(c) Section 76 of the NLC provided that alienation would only be complete upon registration. Notwithstanding the alienation had been approved, the land in question would still remain as State land until registration.

[20] It was the submission of the respondents that, on the facts of this case, even if alienation had been approved on 26 July 1995, but as no registration had been completed, the land remained as State land and by virtue of s. 40 of the NLC, nobody could assert any right over it, even if prior approval had been granted, in regards to its alienation. The respondents had gone one step further in their contention that had become the crux of their case, namely that the decision of the SA in revoking the alienation order, was immune from any form of judicial scrutiny, including by way of judicial review. As can be seen in the preceding paragraphs of this judgment, this submission had found favour with the learned judge of the High Court.

[21] We are of the respectful view that a few important legal propositions have been forwarded by learned counsel for the respondents. The fact that the NLC vests the power pertaining to all State land within the State, in the SA is beyond question, in view of s. 40 of the NLC. The further fact that the SA has the power to alienate State land is contained in s. 42 of the NLC and that such power be exercised in line with the provisions as contained under s. 76 of the NLC. According to s. 78 of the NLC the alienated State land remains as State land until it is finally registered in the name of the person to whom it is finally transferred as evidenced on the register of land titles at the Land Office. For the purpose of this appeal, those positions, in our view, are not in serious dispute. The next issue is whether the SA has the power to revoke the order of alienation already granted, but which alienation has not been completed.

[22] That would necessarily bring us to the case of *North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor* [2011] 2 CLJ 392. In this regard, we would allude to the majority decision of the Court of Appeal in a speech by Justice Abu Samah JCA (as he then was) where he had said as follows:

> [25] Upon a close scrutiny of the Code, it appears that there is no express provision therein which prohibits the State Authority to revoke or withdraw prior approval of alienation of State Land before the registration of a register document of title. The wording of s. 78(3) of the Code tends to suggest that such provision is not necessary. The need to revoke has not arisen as the land is still State Land by virtue of the said section. The contention that the State Authority cannot revoke the approval for alienation of State Land once approved goes against the grain of s. 78(3) itself. The power to revoke is implicit in that subsection itself. It is absurd to say that the State Authority has lost control over the land after alienation when s. 78(3) plainly states that it is still its land until registration.

[23] This Court of Appeal ruling by the majority was affirmed by the apex court on appeal by the aggrieved appellant in *North East Plantations Sdn Bhd lwn. Pentadbir Tanah Daerah Dungun & Satu Lagi* [2011] 4 CLJ 729 ("*North East Plantation* case"). The learned President of the Court of Appeal, Alauddin bin Mohd Sheriff (as he then was) had this to say:

> The power to refuse the payment submitted by the appellant was impliedly stated under s. 78(3) NLC. That section clearly provided that so long as the land was not registered in the appellant's name, it was still owned by the State Government. This accordingly implicitly meant that the State Government had the power to revoke the previous approval and reject the payment made by the appellant. There was no express provision in the NLC which stated that the State Government must accept the payment made by way of Form 5A. Thus, the first respondent's act of rejecting and returning the payment made by the appellant was valid and proper following the provision of s. 78(3) NLC.

[24] Premised on the above decision by the apex court in the *North East Plantation* case (*supra*) we are bound in that the SA has the power to revoke an order of alienation on the proper construction of s. 78(3) of the NLC as alluded to by the learned apex court justices. Although there are no express words employed in the NLC providing for such a revocation power, the apex court had decided that the SA had the power of revocation by necessary implication. It was an implicit power which, does not need to be expressly provided for. To that extent, the position on revocation of an order of alienation has therefore become settled law.

The Issue Of Prerogative Power

[25] In this appeal before us, learned counsel for respondents had further contended that the power to revoke is in the nature of a prerogative conferred on the SA, whereby its exercise would be immune from scrutiny by the courts. In other words, its exercise is non-justiciable. This contention had found favour with the learned High Court, but a perusal of the learned judge's ground of decision has not yielded to us the rationale behind such a finding by him. Be that as it may, before us, learned counsel for the second respondent had cited to us the case of *Dr Zambry* (supra). That case relates to the Perak constitutional crisis of 2009. The decision of this court written by learned Justice Raus Sharif JCA (as he then was) was illuminating in that regard. But at the outset, we must state here clearly that in *Dr Zambry* case (*supra*) the court there was concerned with the express provisions relating to the power of the Sultan of Perak as expressly provided for in the Perak State Constitution in the event that some constitutional crisis were to happen, affecting the position of the Menteri Besar, thus the efficacy of his Government in administering the State of Perak. In that *Dr Zambry* case (*supra*), the circumstances surrounding the exercise of the power by the then Sultan of Perak were ventilated and at the end of the day, it was held by this court that the then Sultan of Perak was correct in withholding the dissolution

of the Perak State Assembly. His Highness had acted within the parameters of his prerogative powers conferred on him expressly, by the State Constitution of Perak. A key feature to note in that case is that the express power conferred on the Sultan of Perak by the governing law is clearly one that is in the nature of a prerogative. The speech of the learned Justice Zainun Ali was clear in that regard, where Her Ladyship had said as follows:

> [240] In any case His Royal Highness was exercising his prerogative powers which are discretionary under art. XVIII(2)(b). The decision thereof is non-justiciable (Council, Civil Service Unions and Minister of the Civil Service [1984] All ER 956). That decision to withhold His Royal Highness' consent even given its plain and ordinary reading, predicated on the facts, is well within the realm of His Royal Highness' absolute power.

[26] It is pertinent at this stage, to our mind, to dwell a little on the word 'prerogative'. It has been defined to mean a right or privilege exclusive to a particular class. In fact, *Merriam-Webster Dictionary* has defined that word to mean an exclusive or special right, power, or privilege: as (1) belonging to an office or a special body ... or (3) one possessed by a nation as an attribute of sovereignty. It is our respectful view that the prerogative that was the issue in the *Dr Zambri* case (supra) had referred to the royal prerogative that is concerned with the formal royal prerogative of the monarch in relation to the appointment of the Prime Minister or the like public office. That type of prerogative would be immune from judicial scrutiny. But not, with respect, the power of the SA on matters pertaining to alienation or the revocation of the same under the NLC. While such power vests in the SA, it is still a power in the nature of a discretion. In such a case, its exercise, just like any other discretion, must be undertaken judiciously. A public authority that is clothed with a discretion cannot discharge that discretion with impunity.

[27] A 'prerogative' has also been described by Lord Roskill in the case of *Council of Civil Service Union & Ors v. Minister for the Civil Service* [1984] 3 All ER 935 ("*CCSU* case") as follows:

> … Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grants of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

[28] We think the words of Lord Fraser would depict a clearer picture when he said in the same *CCSU*'s case (*supra*) as follows:

> The prerogative is the name for remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers.

[29] In the case before us, the power to revoke is one that is implied from the reading of s. 78(3) of the NLC read together with s. 40 of the same NLC. Indeed, there has been no affidavit filed by the respondents alluding to the very exercise of this power to revoke an alienation order by the SA. In the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 the learned Justice Raja Azlan Shah Ag Chief Justice Malaya (as His Majesty then was) had occasion to say the following:

> … I read the affidavit of the Chairman, Land Executive Committee as claiming an unfettered discretion to grant or reject any application under section 124 or impose such conditions or other requirements as the Committee think fit. I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms …

[30] His Highness the Sultan of Selangor may be informed subsequently of the decision already made, but there was no evidence led as to whether His Highness had participated in the deliberation as to whether to revoke the prior alienation order, in exercise of this power before the revocation was made. To say that the decision of the SA in revoking the order of alienation previously given to a person is a decision in the nature of a prerogative, would, in our view be stretching it too far and cannot be justified in law. Even looking at the power to alienate any State land by the SA, s. 42 of the NLC specifically outlines the manner in which an alienation ought to be done. It is clear to our mind that by virtue of such clear statutory provision as contained in s. 42 of the NLC, it cannot be correct for learned counsel for the second respondent to submit that the power to revoke an order of alienation that has been granted earlier, is in fact and in law a prerogative power which exercise cannot be a subject of judicial scrutiny by the courts.

[31] To our mind, the very existence of s. 42 of the NLC points directly to the nature of the power of the SA in which is vested the power of disposal of State land within the territory of a State. In fact, s. 42 of the NLC further stipulates that the SA's power to alienate State land shall be in accordance with the provisions as contained under s. 76 of the NLC. Section 76 further sets out the extent of the alienation in that it will only be complete upon registration on the Register of Titles. From the combined reading of those sections referred to by us, the power of the SA is indeed fully circumscribed. In fact, as alluded to earlier, there is a clear omission to mention power of revocation in s. 76 of the NLC, prior to registration. But the apex court in the *North East Plantation* case (*supra*) had expressed the view that such power

to revoke is to be implied on the SA. Implicit is the word used to describe existence of such power to revoke. That is the state of the law, on revocation of an alienation order in the context of the National Land Code ("NLC").

[32] That however, to our mind, is as far as the apex court in the *North East Plantation* case (*supra*) had gone with regard to latitude of the power to revoke conferred by necessary implication, on the SA. That fact did not escape the acute observation of the learned President of the Court of Appeal sitting in the apex court and deciding on the final appeal by the aggrieved appellant in that case. We reproduce here what His Lordship had said:

> (4) Just because the appellant's application for alienation of land was approved did not mean that the State Government was bound contractually and that it could not decide to revoke the approval given. According to the Federal Constitution (Ninth Schedule) and under s. 40 NLC, 'land' belonged to the State and as the owner it had the right to make any decision or take any action that was thought appropriate and reasonable. **Whether the act of revoking an approval was appropriate constituted a separate issue** and could not nullify the State Government's right as the owner of the land. (emphasis added)

[33] Section 40 of the NLC declares that the SA is vested with power over the State land within the State. The ensuing sections in the NLC outline the manner as to how the SA is to alienate the State land. There are set parameters to be followed before an alienation is legally complete in favour of the person in whose name the land has been alienated. Already, the power to alienate which is expressly stipulated in the NLC is regulated within the regime of the NLC. Meaning, the SA cannot alienate State land to just anybody, arbitrarily. Once it decides to alienate a State land, the provisions of ss. 76 and 78 of the NLC are triggered and must be complied with.

[34] It is indeed very difficult for this court to accede to the submission by learned counsel for the respondents that the power to revoke, which is an inferred power, can be interpreted as a prerogative power which brings along with it immunity from any judicial scrutiny, by way of judicial review. If such had been the intention of the Legislature, surely such drastic power would have been expressly provided for, which would include the clear ousting of the power of the courts to adjudicate upon its exercise by the SA in revoking the order of alienation. But, we cannot find such ouster provision in the NLC. Neither had learned counsel for the respondents referred to us any provision of such consequence in the NLC, in the course of his submissions, oral or written, before us.

[35] In that regard therefore, the case of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105 ("*Sugumar* case") that was referred to us by learned counsel, with respect, can be readily distinguishable on the facts, as obtaining in the respective cases. In *Sugumar* case (*supra*), the apex court had looked at the clear ouster provisions that had

sought to exclude judicial intervention pertaining to a decision of the Immigration authorities in Sabah, that had adversely aggrieved the respondent *Sugumar* who was denied entry into Sabah by the State Government of Sabah, on whose direction, the Director of Sabah Immigration Department had acted in a manner that was objected to by *Sugumar*. It was the finding of the apex court in that *Sugamar* case (*supra*) that the express provisions under scrutiny had not left any room for doubt as to the intention of the Legislature to shield the decision of the Sabah Government on Immigration matters, from the purview of the courts by way of judicial review. In other words, the decision is immune from any review by the courts. It is therefore a non-justiciable decision. Learned counsel for the respondents cited to us the *Sugumar* case (*supra*) to illustrate the point that the decision of the Sabah Immigration authority on the direction of the Sabah Government to ban the entry of *Sugumar* into Sabah had been held as good and valid in law and that it was immune from the scrutiny of the courts by way judicial review. In other words, it was a prerogative of the Sabah Government to deny a person entry into Sabah. The apex court in that case had ruled against *Sugumar* by virtue of the express provisions, as amended, in the Immigration Act 1959/63 which expressly ousted the power of the court of law to review the exercise of such power. The apex court in *Sugumar* case (*supra*) had said:

> Also, the language in s. 59A is explicit with respect to the exclusion of the judicial review. By deliberately spelling out that there shall be no judicial review, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act.

[36] The stark difference between the *Sugumar* case (*supra*) and this instant appeal before us lies in the presence of express words by Parliament to clearly declare its intention to oust the power of the court of law to intervene with the decision made pursuant to the amendments made to the Immigration Act 1959/63 in question. We have seen how the power to revoke the order of alienation was dealt with in the context of the NLC. Indeed, such power was read into the NLC by necessary implication by the courts in the *North East Plantation* case (*supra*). As such, we do not see how, with respect, the *Sugumar* case (*supra*) can be used to further the respondents' submission that the power to revoke is a prerogative power.

[37] As such, the same conclusion cannot be arrived at pertaining to the nature of the power to revoke an alienated State land under the NLC. A stronger set of clear words would need to be employed in the NLC in order for the court to rule in favour of the respondents' submissions that such power of revocation is indeed a prerogative power, with its attendant immunity from the court's scrutiny. We find no such words in the NLC to suggest such an intention on the part of the Legislature.

[38] Premised on the above, we are not with learned counsel for the respondents when he submitted in para. 23 in his written submissions, like so:

> 23. We have already known that all State land shall be vested to the State (sec. 40 NLC). Therefore it is the absolute discretion of the State to alienate to whom it pleases. It is submitted therefore, it is wrong to impute any procedural misgiving on the part of the State Authority. There is no policy, procedure, direction whatsoever nature on how State Authority to exercise this absolute power. Any attempt to curtail the power of State is invalid in law.

[39] With respect, we find such submission to be not entirely correct, as it cannot find any sound legal backing to lean on in support. It is our considered view that the power to revoke an order of alienation by a SA is one in the nature of a discretion, as opposed to that of a prerogative or an absolute discretion, as the respondents had submitted before us. We are fortified in our view by reason of the decision of the then Supreme Court in the case of *Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186. We noted that although the Supreme Court had referred to the power given to the Minister as being absolute discretion, their Lordships went on to say that any decision by the Minister in exercise of that discretion is still open to challenge. The following excerpt from the reported decision of their Lordships would demonstrate the true nature of the discretion that was conferred on the Minister by the Act 301:

> The High Court may intervene and set aside an administrative decision made by a Minister in the exercise of his discretion if it can be shown to the satisfaction of the Court that the Minister had **acted without any authority** or had **acted *ultra vires* his authority**. Also, if he had **acted in bad faith** or **contrary to the rules of natural justice or with any element of prejudice or bias** against the person affected by his decision. (emphasis added)

[40] From the above, it would appear, that the fact that there exist at least five exceptions that could render the impugned decision of the Minister invalid, clearly would point irresistibly to a conclusion that the so-called 'absolute discretion', though provided for by the enabling statute, is actually not a discretion which the Minister can exercise with impunity.

[41] In that regard, we need only refer to the oft-quoted judicial statement attributed to Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in the case of *Sri Lempah Enterprise* (*supra*).

> ... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts

A to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been
B said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place", (per Dankwerts LJ in *Bradbury v. London Borough of Enfield*).

[42] Taken as a whole, it gives the SA a discretion as to how to manage State land within the territory of the State. To contend that such power is a
C prerogative, being an extension of the power of the Sultan, over land matters and which exercise is beyond reproach, is to our mind, a fallacy and which cannot find any legitimate legal support.

[43] As such, it is thus our considered view that although s. 40 of the NLC vests the SA with the authority over State land, that power is not a
D prerogative power which exercise is beyond judicial reproach, in the sense that it is not justiciable. On the contrary, it is a statutory power which exercise must be done according to legal principles and good conscience, as it is but an exercise of conferred statutory power by a public body. In such exercise, there is no place for arbitrariness, caprice nor cavalier attitude.
E Indeed, the power to revoke any prior alienation order is not expressly provided for in the NLC, but rather, it is an implied power as decided by the apex court in the *North East Plantation* case (*supra*).

[44] The net result of this exercise is that, while it is within the power of the SA in the sense that it is within its exclusive province to decide on
F matters pertaining to alienation of State land under the NLC, nevertheless, it is still bound under the law to exercise that discretion properly, and not arbitrarily. It is not a power that is synonymous with the prerogative power that the court was concerned with in the *Dr Zambri*'s case (*supra*). Having considered the respondents' submissions, we are of the respectful view that
G his contention that the impugned decision was made pursuant to a prerogative power of the Ruler of the State of Selangor cannot, with respect be sustained.

The Duty To Give Reasons

H **[45]** As such, the principle as stipulated in the *Sri Lempah Enterprise* case (*supra*) is applicable in cases involving exercise of discretion, absolute or otherwise. High authorities have shown such phrase to be a gross anomaly that cannot pretend to even co-exist. (See for instance: *Pyx Granite Co Ltd v. Ministry Of Housing And Local Government* [1958] 1 All ER 625). In exercise
I of a public power, there is no escaping the obligation on the part of the decision-maker to act reasonably in the peculiar circumstances of the case that appears before him. One of the fundamental features in modern administrative law jurisprudence has been the growing need for the public

decision-maker to give reasons for his decision. It may be inconvenient to do so. But it is an indivisible component in all decision-making processes. We find that every decision, both good and bad, is driven to such conclusion by a reason. Learned Justice Zainun Ali JCA (as she then was) in the case of *Datuk Justine Jinggut v. Pendaftar Pertubuhan* [2012] 1 CLJ 825; [2012] 3 MLJ 212 had said this:

> Thus if no reason is given by the respondent, it is open for this Court to conclude that he had no good reason in as much as it is open for us to conclude that the respondent had not exercised his discretion in accordance with the law.

[46] *Sugumar* case (*supra*) was also cited as support for the proposition that as the statute was silent on a duty to give the reason for a decision, therefore it was not incumbent on the Director of the SA to furnish any reason for the revocation of the order of alienation of the land. But the apex court in the *Sugumar* case (*supra*) had indeed recognised the current trend that is in favour of public decision-makers giving reasons for their decisions, though on a case by case basis. We reproduce below the relevant portion of the apex court's decision that pertains to that issue on the need to give reasons for a decision by a decision-maker exercising public duty emanating from an enabling statute. It appears at p. 107 of the decision that was written by Justice Mohd Dzaiddin, as follows:

> Section 65(1)(c) of the Act does not impose an express statutory duty on the appellant to give reasons to the respondent. Insofar as the common law is concerned, the trend of law is towards giving reasons but on a case by case basis.

[47] On the facts of the *Sugumar* case (*supra*), the apex court was of the view that the Director of Immigration Sabah could not be expected to provide reasons to the respondent since the director was merely carrying out the directions of the appellant. In other words, he was not, in effect, the decision-maker and as such, no duty was imposed on him to give any reason for the adverse decision that had aggrieved Sugumar.

[48] It cannot be denied that the decision in *Sugumar* case was decided as such, based on the peculiar factual matrix of that case which included, to a large part, in the proper interpretation to be given to the statute under scrutiny before the court. And what cannot as well be denied is that the apex court recognised the trend of law "but on a case to case basis", which in our view is a fair and sensible approach to follow as one cannot foresee what the possible circumstances may present themselves before the courts for the latter's decision.

[49] Learned counsel for the respondents had also submitted that there was no duty expressly provided in the NLC for the SA to give or assign any reason(s) for deciding the way it deems fit. The case of *Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor* [1990] 1 CLJ 44; [1990] 1 CLJ (Rep) 200

was cited in support. But, we could not find any statute which contains express provisions that affirmatively prohibit a public officer, as a decision-maker, in the discharge of his public duty, from assigning any reason for his decision. Indeed, it would be most strange, if there was one such statute. We say so because it would defeat the essence of good governance and that it would not promote accountability and owning up to responsibility in decision-making. As such, the silence in a statute requiring that a reason or reasons be given by the decision-maker ought not to be taken to mean that there was therefore no duty to give reasons. The silence in the statute, on the duty to give reason for a decision, ought not to be made a cloak or a blanket under which the decision-maker could conveniently find refuge so that the rationale for his decision remains shrouded in mystery, privy only to himself, but not to the public at large, on whose behalf, he is entrusted to discharge that duty. That scenario would indeed be a contradiction in terms. The proper view, as stipulated by the apex court in the *Sugumar* case (*supra*) is to be preferred in that, whether a reason need to be given by a decision-maker, is to be determined on a case by case basis. In the case of *R v. Secretary Of State For Trade And Industry, Ex parte Lonhro Plc* [1989] 1 WLR 525 ("*Lonhro* case"), Lord Keith of Kinkel, had this to say:

> The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision.

[50] In the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 FC ("*Majlis Perbandaran Pulau Pinang* case") Justice Edgar Joseph Jr had this to say:

> At this point, we should like to say a few words on the ambit of the duty to give reasons on the part of a decision-maker in the rapidly developing field of administration and where the courts exercise supervisory jurisdiction over acts of subordinate authority.

[51] His Lordship went on to state:

> In *Breen v. Amalgamated Engineering Union* [1971] 2 QB Lord Denning observed that where a person "has some right or **interest**, or legitimate expectation of which it would not be fair to deprive him without a hearing or reasons given, then these should be afforded him accordingly, as the case may demand". (emphasis added)

[52] Indeed, in the case of *Rohana Ariffin v. Universiti Sains Malaysia & Another Case* [1988] 1 CLJ 559; [1988] 2 CLJ (Rep) 390 the court there had said that "a reasoned decision can be an additional constituent of the concept of fairness".

[53] In the decision of the case of *Doody v. Secretary Of State For The Home Department* [1993] 3 All ER 92 it could be gleaned that the requirement of fairness or natural justice depends upon the context of the decision. Lord Mustill who spoke for his peers in the House of Lords in the *Doody* case (*supra*) had this to say:

> I accept without hesitation … that the law does not at present recognise a general duty to give reasons for an administrative decision. **Nevertheless it is equally beyond question that such a duty may in appropriate circumstances be implied**. (emphasis added)

[54] The question that therefore begged an answer is whether in the circumstances of this case, there arose a duty on the part of the respondents to give reason(s) for having decided to revoke the grant of alienation in favour of the appellant.

[55] Reverting to the circumstances of this case, alienation was done more than 15 years ago. Taking away the consideration of legitimate expectation (as it had been abandoned by the appellant) this court is of the respectful view that the appellant must, in all fairness, be said to have an interest in the land. The land use of the alienated land had been changed on the application by the appellant and was approved by the respondent. Taking into account *Breen v. Amalgamated Engineering Union* [1971] 2 QB 175 ("*Breen* case") as well as *Doody* case (*supra*) we are of the view that the duty to give reason for revoking the alienation did arise on the part of the respondent SA. To paraphrase the words of Lord Mustill in the *Doody* case (*supra*) a duty to give reasons ought in the circumstances of this case, be implied.

[56] This court is aware that the power to revoke lies exclusively within the province of the SA and the SA alone. But that exclusivity does not however confer upon the SA an absolute discretion as to how such discretion was to be exercised in the revocation of an alienation earlier granted in respect of a piece of State land. We had adverted to the acute observation by Justice Raja Azlan Shah in the *Sri Lempah Enterprise* case (*supra*) that an 'absolute discretion' is a contradiction in terms. It only has the abhorrent effect of festering dictatorship. The former Lord Chief Justice of England and Wales had succinctly written, in his much-acclaimed work entitled *"The Rule of Law"* [2011] on the very exercise of a decision-maker of his statutory power, as follows:

> First is the requirement that statutory powers should be exercised in good faith, that is, honestly. It is presumed that Parliament intends no less. It has been described that the first principle of judicial review is that a discretion must be exercised in good faith.

[57] The reviewing court will look to see whether in the overall circumstances of the case, the decision-maker has discharged that statutory power in good faith. In respect of this appeal, we have expressed our view in the preceding paragraphs. The lack of reasons having been assigned by the

SA, in the circumstances of this case, pointed rather irresistibly to the conclusion that it had lacked good faith in revoking the grant of alienation of the subject land. It was very difficult, to say the least, to discern any good faith in its exercise of the statutory power against the appellant, when no reason, ostensible or otherwise, was given for the revocation. Such an approach could be attributed to a misconception as to the extent of its power. Or, that it had mistaken its discretion as a prerogative whereby the need to give reasons did not arise. In *Majlis Perbandaran Pulau Pinang* case (*supra*), Edgar Joseph Jr FCJ (as he then was) in delivering the judgment of the Federal Court had occasion to say (at p. 119):

> ... people expect fairness in their dealings with those who make decisions affecting their interests.

[58] In the circumstances, it is our considered view that, based on the authorities cited above as well premised upon the relevant statutory provisions as contained in the NLC and the principles on the rule of law, the SA is vested with the power to deal with all State lands and that includes the power to revoke the order of alienation made previously in respect of certain State lands. To that extent, the law is clear. But we are of the considered view that the power so vested in the SA is not one that is in the nature of a prerogative. It is a statutory power that confers discretion on the SA, by way of necessary implication, to revoke an order of alienation previously made in respect of a piece of State land. That was the view of the majority in the *North East Plantation* case in the Court of Appeal and which view was affirmed by the apex court on appeal by the appellant. As such, like all discretionary powers, it ought to be exercised judiciously, not with caprice nor arbitrarily. As to whether the SA as in this case, ought to assign reason or reasons for any revocation of the previously alienated land, that with respect, must depend on the peculiar facts obtaining in the case before the SA.

[59] A duty to give reasons for a decision is *ipso facto*, a neutral at the highest. Indeed, it would only assume great relevance when viewed in the context of the particular decision itself, which is under scrutiny. In a case where the decision is one that is straightforward and one that is not mired in circumstances that would invite deeper rationalisation, then, perhaps, the need to give reason by the decision-maker, may not arise. But in a case where the circumstances clearly and reasonably suggest that decision 'A' ought to be granted, but yet, decision 'B' was instead given, then the balance must tip in favour of assigning a reason or reasons for one's decision and "the decision-maker, who has given no reasons (in such circumstances), cannot complain if the court draws the inference that he had no rational reason for his decision", to borrow, if we may, the words of Lord Kinkel in the *Lohnro* case (*supra*)". The law does not impose an onerous burden on a decision-maker to give reasons in all cases, but as Lord Denning LJ (as he then was) in the *Breen* case (*supra*) had opined, it should be considered 'according as the case may demand'.

[60] Indeed, in the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665 ("*Hong Leong Equipment* case"), learned Justice Siti Norma Yaacob JCA (as she then was) at p. 752 had said:

> In his one sentence letter informing the respondent of his decision, the second appellant gives no reasons for his decision, and likewise in his affidavit-in-reply. There is no statutory duty to give reasons, but in the modern climate of administrative law, such an omission may no longer be justified. 'The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest: indeed rather the reverse. That being so, I would ask simply: is a refusal to give reasons fair? I would answer without hesitation that it is not' (per Lord Mustill in *Doody*'s case).

[61] From the above, it is clear that the fact that a particular statute under scrutiny, that is the NLC in this case does not expressly provide a duty on the SA to give any reason when it decides to revoke an alienation order, does not necessarily excuse the decision-maker from assigning any reason for his decision. The circumstances obtaining in the particular case may invite an imposition of the duty to give reasons by necessary implication. Lord Mustill in the *Doody* case (*supra*) had said the following:

> I accept without hesitation … that the law does not at the present recognise a general duty to give reasons for an administrative decision. **Nevertheless it is also equally beyond question that such a duty may inappropriate circumstances be implied** … (emphasis added)

[62] As alluded to earlier, the apex court in the *Sugumar* case (*supra*) had recognised this approach and the inevitable trend in favour of assigning reasons for decision-makers in the realm of public administration and public law. It is therefore rather settled that the duty to give reasons, even when the statute is silent, would depend on the dictates of the factual matrix obtaining in each case.

[63] Applying that principle to the facts of this case under appeal, we are of the view that there had arisen a duty on the part of the SA to give reasons why the alienation granted prior, was revoked. At the outset, the land in question was alienated to the appellant in 1997. Between that time and 2013, several steps had been done in relation to that land whereby its use had been changed a few times as applied for by the appellant. It is therefore clear to our mind that the appellant had an interest in the land, an interest that was with it for over ten years. The appellant may not be the registered owner of that land, but to state that it had no interest in the land would be unjustified as well as it would be unfair. Lord Denning LJ in the *Breen* case (*supra*) had said:

> ... if a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given … but … if he is a man who has some right or interest or some legitimate

A

> expectation, of whom it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand.

[64] In this case, the appellant was on the verge of completing the alienation process that could see it as the registered owner of the land, as all
B the application and paper works had been in place and forwarded to the SA. After waiting in vain for a further two years, the appellant was informed that the order that had alienated the land in its favour was revoked. As it turned out, the said land had been alienated to some other party. No reason was given for the revocation. We are of the view that these circumstances demand
C that reasons be given to the appellant as to why the alienation was revoked at a very late stage. No doubt, the SA can revoke, but in the factual matrix of this case, reason(s) ought to have been given to the appellant. As there was no reason given, when in fact and in law, it ought to be given by the SA when it revoked the alienation, that decision is therefore, bad. To repeat the words
D of learned Justice Siti Norma JCA (as she then was) in the case of *Hong Leong Equipment* case (*supra*):

> The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest: indeed rather the reverse. That being so, I would ask simply: is a refusal to give reasons fair? I would answer without hesitation that it is not (per Lord Mustill in *Doody*'s case).

E

[65] On that ground alone, the decision is liable to be quashed as being bad.

On The Issue Of Affidavit

[66] For completeness, we will now deal with the issue surrounding the
F affidavit. This matter relates to the appellant's contention that since the respondents did not file in an affidavit-in-reply to its affidavit alleging the fact that the revocation was made due to non-payment of the premium on the land, then the respondents must, in law, be deemed as having admitted that factual circumstance. The case of *Ng Hee Thoong v. Public Bank Bhd* [1995] 1 CLJ 609 ("*Ng Hee Thoong* case") was cited in support. The respondents'
G position had been that it was incumbent on the appellant to prove its allegations. As the allegation in the affidavit was based on an apparent hearsay by one Anthony, there was no legal obligation to reply to the same by way of an affidavit by the respondent. With respect, we are in agreement with learned counsel for the appellant that the Evidence Act does not apply
H to affidavits as stipulated in the Evidence Act itself. Thus the hearsay rule does not bite in relation to affidavits.

[67] Factually, it concerned a factual circumstance where Anthony, an officer of the appellant had allegedly been told by one Dato' Zulkepli bin Ahmad, an officer of the respondents that the reasons for the revocation was
I because the appellant had failed to pay the premiums in respect of the land. The undisputed fact was that the respondents had not even approved that pre-computation plan which was sent by the appellant two years ago and

which had been approved by the respondents. Without that, Form 5A could not be issued and flowing from that, no premium could be calculated for the land in question. It would be so easy for the respondents to rebut this allegation as the said officer was under the respondents' employment. We are also in agreement with him that the rule in the *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248; [1997] 2 MLJ 17 ("*Zain Azahari* case") is very much in play in the circumstances of this case. As such, the failure to file in the affidavit in reply must be taken to mean that what has been alleged in the appellant's affidavit was admitted to by the respondents. The respondents had submitted that Dato' Zulkepli could not speculate the reason why the alienation was revoked by the SA. Therein lies the stark irony of it all. Even Dato' Zulkepli, being a senior officer at the District Office of Petaling, where the land was situated, was left to speculating and guessing as to what was the reason for the revocation. Learned counsel had submitted that it was sufficient and enough that the alienation was revoked 'for reason best known to them.' (See p. 26 of Hujahan Responden-Responden). By 'them', it must, we surmise, refer to the SA.

[68] But as alluded to earlier in this judgment, the power to revoke by the SA is not a prerogative. Though the NLC is silent on the giving of reasons for such a decision, the circumstances in this case appropriately demand that a reason be given for such revocation. The SA had failed to give any reason for the revocation. That, in itself, had vitiated the decision. It had failed the *Wednesbury*'s test of reasonableness and the procedural fairness test propounded by Lord Diplock in *CCSU* case.

[69] To recap, s. 40 of the NLC vests all State land in the SA. But its disposal is regulated by the same statute that has vested in it all State land within its territory. Section 42 of the NLC states that the SA may alienate any State land but must do so according to s. 76 therein. Section 78 of the NLC has been interpreted by our courts to have implicitly conferred power of revocation of an alienation order to the State in the absence of express words to that effect. (See, the *North East Plantation* cases (*supra*)). The combined reading of the relevant provisions referred to above, to our mind, would have the effect that such power of revocation is not a prerogative power. It is in the nature of a discretion emanating from statute which exercise is circumscribed by statute and legal principles pertaining to public law. Such decision is not immune from judicial review. In the context of the factual matrix of this case, the failure to give reasons for the revocation has rendered the impugned decision bad and is hereby quashed by this court, issuing an order of *certiorari* to that effect.

Conclusion

[70] Premised on the above, we therefore would allow this appeal with costs. The decision of the learned HCJ is set aside. As such, we grant the declaration as applied for by the appellant in that the decision of the MMKN

dated 23 May 2012 and communicated to the appellant on 6 July 2012 to withdraw the alienation on plot of land measuring 11.572 acres in Kampung Melayu Subang Tambahan, Pekan Baru Subang, District of Petaling Jaya, Selangor to be null and void and of no effect. We also issue the order of *certiorari* and quash the said decision of the SA in revoking the alienation order in favour of the appellant.

[71] We are also minded of the decision of the Federal Court in the case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 142 in particular, the speech by learned Chief Justice Eusoff Chin at p. 167 (CLJ); p. 183 (MLJ) as follows:

> It is clear that the High Courts and the Federal Court have adopted a liberal and progressive approach in *certiorari* proceedings, and I find that where the particular acts of the case warrant it the High Court should endeavour to remedy an injustice when it is brought to its notice rather than relief to an aggrieved party on purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice.

[72] In the circumstances of this case, we order that the SA do refund whatever monies that had been expended by the appellant in relation to the land in question from the date of its alienation to the date of its revocation, with interest of 5% pa from date of judgment till full payment. The appellant/applicant cannot be given any damages, as it had no title over the subject land, which we found, based on the apex court's decision in the *North East Plantation* case (*supra*), was still vested in the State Authority/ respondent."

[73] Further, following in the footsteps of the apex court in the *Sri Lempah* case (*supra*) we order that the application of the appellant be remitted back to the SA, being the nominated decision – maker, for it to consider the application and according to law and to make a lawful decision. (See, *"The Rule of Law"* by Lord Tom Bingham (2011) p. 61). We noted that this approach was employed as well early on, in the case of *Sri Lempah* (*supra*) where His Lordship Raja Azlan Shah FJ (as His Highness then was) having ruled that the decision of the Land Committee was *ultra vires*, had further ruled that since the Land Committee was the designated decision – maker, he had remitted the case back to the Land Committee "for a fresh reconsideration and conclusion according to law." To this, both learned Justices Suffian LP and Chang Min Tat FJ did not demur.

[74] We also order costs of RM20,000 to the appellant for here and below subject to payment of allocation. The deposit is ordered to be refunded to the appellant.